STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges Hilda R. Gage, Mark J. Cavanagh and Kurtis T. Wilder, Presiding

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs. S CT No 122183

TIMOHTY ZUBKE,
Defendant-Appellee.

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Wayne Circuit Court No. 00-010443
Court. of Appeals No. 234130

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# DEFENDANT-APPELLEE'S BRIEF ON APPEAL
# ORAL ARGUMENT REQUESTED

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Appellee accepts appellant's jurisdictional statement.

## STATEMENT OF FACTS

The Defendant-Appellee, Timothy Zubke, was charged in a two (2) count information with count one (1) possession with intent to deliver more than 225 grams but less than 650 grams of cocaine and count two (2) felony firearm. (46a).

A preliminary examination was conducted on September 15, 2000 at which the factual basis for the charges were placed on the record. On July 6, 2000 at 7540 Appoline, a house in the City of Dearborn, the police executed a search warrant. This address was Mr. Zubke's house and in his bedroom was found 277.57 grams of cocaine and a gun was found there as well. (56a, 57a). Mr. Zubke was bound over as charged.

On February 27, 2001, counsel for Mr. Zubke filed a Motion to Dismiss Pursuant to Statutory Double Jeopardy for Mr. Zubke had pled guilty to conspiracy to distribute marijuana and cocaine in federal court and attached to the motion were the following:

(1) a copy of a federal indictment dated August 10, 2000, naming Mr. Zubke and 12 other codefendants in a ten (10 ) count indictment. The federal indictment included activity from **January 1, 1993 until August 10, 2000** and charged Mr. Zubke in count one (1) with conspiracy to distribute marijuana and cocaine, in count three (3) with distribution of cocaine, aiding and abetting, count four (4) distribution of cocaine, aiding and abetting, count five (5) distribution of cocaine, aiding and abetting. (13a - 25a).

(2) a copy of the federal Rule 11 Plea Agreement, signed by Mr. Zubke on December 7, 2000. The United States Attorney permitted Mr. Zubke to enter a plea to count one (1) of the indictment, that is, conspiracy to distribute cocaine and marijuana and dismissed the other counts. (26a - 45a).

(3) an affidavit by Assistant United States Attorney Ross Parker dated February 20, 2001. In this document AUSA Parker stated that he was the AUSA that prosecuted Mr. Zubke. That Parker knew prior to filing the indictment that Mr. Zubke had been arrested on July 6, 2000 by city and township police in this matter. He stated:

> 'Federal agents were not involved in these activities. Although Zubke was not charged federally with the substantive offenses resulting from this law enforcement action, it was the government's intention to proffer evidence of these incidents in federal court as part of its case in chief had Zubke gone to trial. Based on the circumstances known we believe that his actions were overt acts in furtherance of the conspiracy charged in the indictment.' (47a, 48a).

Being a trial court motion, these documents were filed in the trial court file thus they are part of the record in this case. These documents were also filed as an appendix to the prosecutor's brief on appeal in the Court of Appeals and with this court.

The motion was argued on March 9, 2001 and on March 23, 2001 Judge Jackson placed on the record his findings of fact and conclusions of law.

The judge looked at MCL 333.7409 and stated that: "This is a statute that was enacted and specifically enacted and designed, you know, for drug cases, specifically the statutory kind of double jeopardy claim that I believe is not to be looked at or to be handled by, in terms of the general kind of a statute involving double jeopardy." (107a). The judge looked at the intent of the statute and found that its purpose was to prevent persons having to face both Federal and State charges for what amounts to, you know, to the same act or arising from that.' (109a). The judge ruled 'there's no question that the State charges arose out of the same act as those that form the basis of the Federal conviction.' (109a). The judge ruled MCL 333.7409 barred the state prosecution in this

case on double jeopardy grounds and dismissed the case. (111a).

The prosecutor appealed the trial court's decision.

The Court of Appeals affirmed the decision of the trial court. (4a). The prosecutor appealed and this Court granted leave. (3a, 8a).

## ARGUMENT

### I

WHEN A FEDERAL INDICTMENT FOR CONSPIRACY TO DISTRIBUTE COCAINE INCLUDES AN ACT IN FURTHERANCE OF THE CONSPIRACY WHICH AROSE FROM AN ARREST BY STATE AUTHORITIES, **MCL** 333.7409 PREVENTS STATE PROSECUTION ON THAT ACT AFTER THE DEFENDANT HAS PLED GUILTY TO THE FEDERAL CONSPIRACY CHARGE WHICH INCLUDED THAT ACT.

**STANDARD OF REVIEW**

We review questions of statutory construction de novo. **People v Morey**, 461 Mich. 325, 329-330 (1999).

In his State case, Mr. Zubke was charged with possession with intent to deliver 225 grams or more but less than 650 grams of a mixture containing the controlled substance cocaine and felony firearm. (46a). In his federal case, Mr. Zubke pled guilty to conspiracy to distribute cocaine and marijuana, 21 USC Sec 846, (26a) and the Assistant United States Attorney specified via affidavit that the state delivery case was an overt act in furtherance of the federal conspiracy. (47a).

When considering the Defendant's Motion to Dismiss Pursuant to Statutory Double Jeopardy, the trial judge was 'trying to understand what is the purpose and intent of the statute when it was enacted by the Michigan State Legislature.' (107a). And the judge ruled: 'I think what the intent of the statute is, and that is to, I think, prevent persons having to face both Federal and State charges for what amounts to, you know, to the same act or arising from that.' (109a).

In the prosecutor's footnote number 11, the prosecutor tries to argue that the conduct punished by the federal authorities was different than that addressed by the

state charge. The prosecutor would have this court ignore the fact that the federal indictment covered the time between January 1, 1993 and to August 10, 2000, the date of the state case was July 6, 2000, squarely within the federal conspiracy time frame. The prosecutor would have this court ignore the affidavit of the AUSA prosecuting the conspiracy charge stating that the July 6, 2000 activities by Mr. Zubke were 'overt acts in furtherance of the conspiracy charged in the [federal] indictment.' The prosecutor would have this court ignore the preliminary examination testimony in this matter in which an officer recited Mr. Zubke's statement upon arrest, that he [Zubke] purchased the cocaine to resell it at a profit to another person and the officer further testified that a controlled buy was made at Zubke's residence. (P.E.T., 8, 10).

Appellee does not disagree with appellant in his assertion that theoretically the acts of conspiring to possess a substance and possession of a substance are different, as the trial court said, 'this is not relevant to whether Section 7409 is implicated.' (110a). Appellee submits that because the state charge arose out of the same acts as those included in the federal conviction, **People v Avila**, 229 Mich App 247 (1998), as used by the trial judge for authority, is controlling in this case.

The trial judge cited **People v Avila**, **supra**, pointing out that the trial court in that case ruled that Sec 7409 prohibited a prosecution in Michigan after the defendant's conviction for a like offense in federal court; and that the Court of Appeals on the prosecutor's appeal, affirmed; but that 'the Supreme Court at 455 Mich 863' 'vacated' the judgment of the Court of Appeals and 'remanded the case' to the Court of Appeals, which court again ruled in preclusion of a state prosecution (108a).

The trial court in the case at bench then stated that 'I think that this case is very

similar, if not exactly the same as the **Avila** case [.]'(108a). The court went on to say:

> 'I see no real difference, or distinction there, when you look at, I think what the intent of the statute is, and that is to, I think, prevent persons having to face both Federal and State charges for what amounts to, you know, to the same act or arising from that.' (109a).

It is the position of the defendant in the instant case that the trial judge made a correct analysis of Sec 7409, and particularly the trial court was correct in concluding that the crux of the matter for the trial court was to seek and decide 'what is the purpose and intent of the statute when it was enacted by the Michigan State Legislature' (107a). Perhaps a more artful way of putting the question is: what was the intent of the legislature in drafting and passing Sec 7409. To put the matter another way: what was the purpose that the legislature had in mind to accomplish through the adoption of Sec 7409.

**People v Hermiz**, 462 Mich 71 (2000), is not the controlling case on the issue here involved because no view gained the support of a majority of the justices. However, respectful attention must be paid to the opinion penned by Justice Taylor because if in future it gains adherence of one more justice, it will be a binding ruling. Justice Taylor also deemed the Court's task to be to 'give effect to the legislative intent' informing Sec 7409 (Id. 78). To accomplish this mission, the Court quoted with approval and adopted the following language from **People v Morey**, 461 Mich 325, 329-330 (1999):

> 'We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the legislature intended the meaning clearly expressed - no further judicial construction is required or permitted, and the statute must be enforced as written. (citations omitted by the

Court)

This is one of the basic principles which across the years the courts have evolved as criteria of interpretation of statutory language. This principle was expressed in **Jaffe v Harris**, 109 Mich App 786, 791 (1981) as follows:

> 'When addressed with a question of statutory intent, we will look first to the specific language of the statute to determine its meaning.'

There is nothing startling nor novel in the precept that when one seeks to discover the intent animating the legislative intent of a particular statute, he should start at the beginning, **i.e**. with the words used by the legislature in formulating the statute. Without that, there would be nothing to argue about.

But one should always be alert to avoid the logical fallacy of assuming that which is to be proven which inheres in this principle as stated in **People v Morey**, **supra**, and adopted by the Court in **Hermiz**, **supra**. Which is to say that it cannot be said that a legislative intent is plain because the individual words used in an expressive mode are plain without proving that the words used are indeed plain and their meaning uncontestedly plain.

One must always keep in mind the **caveat**:

> ' It is always possible that Congress did not quite mean what it said and did not quite say what it meant.' **Church of Scientology v US Dept of Justice**, 612 F2d 417, 421 (CA9 1980)

There is the further difficulty with the above principle quoted from **Hermiz** which becomes immediately apparent upon the slightest thought: individual words standing alone have almost no meaning whatever. Words assume meaning in the context of a

sentence, and the same word often despite the intent or knowledge of the speaker will because of the context created by the other words in the sentence often if not always have its meaning changed or altered, or subtly nuanced. The same linguistic and semantic phenomenon occurs with the meaning of words in phrases and clauses within individual sentences, and with sentences in the context of paragraphs and other units of verbal discourses: a word's color and meaning is affected by the other words in the context in which it is used.

This is probably the meaning of the statements found in **White v Ann Arbor**, 406 Mich 554, 562 (1979):

> 'The primary and fundamental rule of constitutional or statutory construction is that the Court's duty is to ascertain the purpose and intent as expressed in the constitution or legislative provision in question. Also, while intent must be inferred from the language used, **it is not the meaning of the particular words only in the abstract or their strictly grammatical construction alone that governs**. The words are to be applied to the subject matter and to **the general scope of the provision**, and they are to be considered in light of the general purpose sought to be accomplished or the evil sought to be remedied by the constitution or statute.' (emphases added)

When the Court in **White v Ann Arbor** said 'it is not the meaning of the particular words only in the abstract or their strictly grammatical construction alone that governs', the Court meant that words in their dictionary meaning and in their grammatical garb alone do not convey ideational information; rather it is the context of words forming sentences and paragraphs, etc, which convey ideas and meaning.

What is being attempted here by defendant is an exposition of some basics of semantics, and defendant ventures an assertion that since words, like chameleons,

change their 'colors' according to their contextual environment, one must look at the 'totality' - a term of art so useful in the resolution of problems in connection with questions of determination of probable cause for arrests, stops, searches, etc - of the contexts in which the operative words of the statute are used if a meaningful enucleation of the 'intent', the 'purpose hoped to be achieved' by the legislature, is to be made, and one must even employ and apply creative intuition in the task.

The words of the Court in **Hermiz** quoted above are found in other respected authority; in **United States v Dickson**, 816 F2d 751, 752 (CADC 1987), the Court quoted from **Caminetti v United States**, 242 US 470, 485 (1917) as follows:

> 'Where the language is plain and admits no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.'

Truly a seemingly cogent and resolute principle; however, one needs only to peruse any learned dictionary for the shortest time to realize that there are very few if any univocal words in the English language - or any other language for that matter; so that the above quoted principle has very slight value in the art of interpreting statutory language.

In **People v Lyons**, 93 Mich App 35, 43-44 (1979), the Court said:

> 'It is also well settled that criminal statutes should be construed in light of the evil addressed so as to effectuate the end purpose of the legislation.'

This statement reflects the fundamental of the pragmatic approach to human problems. There are to be found in human life acts done by humans which are inimical to an ordered society, and legislatures through their enactments of laws seek to protect

members of society against these inimical acts. In the very nature of things, the legislators cannot enumerate each and every act at which a particular enactment is aimed as a corrective measure; they must perforce pick a word generic in form which it is hoped will encompass all the acts at which the enactment is aimed. In concrete terms, what particular instances does the generic term encompass? That is the question, and that is where most problems involving meanings originate.

Even if one is bewitched by the idea that the meaning of an enactment can be determined from the literal meanings of the words employed, one should heed the words of the Court in **Aviation Consumer Action Project v Washburn**, 535 F2d 101, 106-107 (CADC 1976):

> 'When a statute is clear and unequivocal on its face, as are the sections of the Acts now before the Court, it has been said that there is no necessity to resort to the legislative history of the Act but that the decision as to its meaning may rest on the words of the statute itself. (citations omitted). However, the plain meaning doctrine has always been considered subservient to a truly discernible legislative purpose. (citations omitted) The use of the legislative purpose is appropriate where the words of the statute are ambiguous or the literal words of the statute would bring about an end completely at variance with the purpose of the act.'

In his dissenting opinion in **United States v Henderson**, 746 F2d 619, 626 (CA( 1984), where the question was what times were excludable under the Speedy Trial Act, Judge Ferguson said:

> 'In **Heckler v Edwards**, 465 US 870, 104 S Ct 1532, 1538 (1984), [], the Supreme Court instructed that we are not to give surface literal meaning to a statutory provision when that interpretation is not consistent with the "sense of the thing". The "sense" of the Speedy Trial Act is to insure defendants a speedy trial.'

The language in **Heckler v Edwards**, 465 US 870 (1984) to which Judge Ferguson had reference is the following:

> '[T]he natural sense of the jurisdictional provision is that the holding of statutory unconstitutionality, not these other issues, is what Congress wished this Court to review in the first instance. Thus, the sense of the statute and the literal language are at loggerheads.' at 879.

Judge Ferguson went on to say that he agreed with Judge Keeton who stated in his opinion in **United States v Hawker**, 552 F Supp 117 (D.Mass. 1982) that:

> 'I conclude that 5(b)(1)(F) of the plan is subject to a qualification, **not stated explicitly anywhere in the text but plainly implicit in the sense of the entire Plan**, that the period of excusable delay under this provision shall not be longer than is consistent with a reasonably prompt hearing.' [emphasis added by Judge Ferguson]

The statute involved in the case at bench is the one identified in **People v Hermiz**, 462 Mich 71, 73 n1 (2000):

> 'If a violation of this article [Article 7 of the Public Health Code] is a violation of a federal law or of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.'

We may, perhaps for clarification purposes, paraphrase the statute as follows:

> 'If an act which is defined to be a violation of any section of this article also meets the definition of a criminal act which constitutes a violation of a federal law or the law of a sister state, a conviction or an acquittal on a charge of violation of such federal law or the law of a sister state is a bar to prosecution in this state.'

Consideration of the words of the Michigan statute Sec 7409, individually and in the context in which they appear, leads one inexorably to the conclusion that the

Michigan legislators intended to imprint the condemnation of the double jeopardy rationale upon any prosecution in this State of any act performed in this state, regardless of any other statute or constitutional provision, which is defined to be a violation of any section of Article 7 of the Public Health Code if it also meets the definition of a criminal act which constitutes a violation of a federal law or the law of a sister state, a conviction or an acquittal on a charge of violation of such federal law or the law of a sister state.

This can be said to be 'the sense of the thing', that the legislators meant to obviate a person's being prosecuted and convicted and punished in two separate political jurisdictions for an act which was in reality but one single act of criminality.

In the case at bench, the gravamen of defendant's offense basically involved the prohibited act of possessing cocaine. In the state case, the charge was translated into physical possession of the cocaine and in the federal case, the act along with other acts was translated into a conspiracy to possess the cocaine.

Justice Taylor in **Hermiz** put great store on the fact, urged upon the Court by **amicus curiae**, that Sec 7409 applies to those narcotic crimes which are defined in 'this Article' and by 'this Article' is meant the entire health code. Conspiracy, however, is defined in **MCL 750.127a**, which is part of the criminal code, not the health code, so that Sec 7409 does not and cannot apply to a charge of conspiracy to commit a crime defined by the health code.

If one adopted the rationale of the **amicus**, then it would follow that defendant's conviction in this case in the federal jurisdiction being on a charge of **conspiracy** to possess the contraband would not prohibit the defendant from being charged by the

state for possession of the same contraband for the crimes defined under the health code involved no conspiracy. But Appellee submits this is the wrong interpretation of the statute. Justice Taylor in **Hermiz** emphasized that conspiracy was a separate crime from any of the substantive crimes defined by the health code, and that a conspiracy - a combination of persons bent on committing crime - was a greater threat to society than was the sole malefactor. All this is true, but Justice Taylor did not pause to explain why the conspiracy statute does not provide for a more severe penalty for conspiracy to commit a crime than is provided for the commission of the crime. **MCL 750. 157a** provides that 'the person convicted under this section shall be punished by a penalty equal to that which could have been imposed if he had been convicted of committing the crime he conspired to commit . . . .'

As Justice Markman stated in **People v Mass**, 464 Mich 615, 648, 649 (2001), the federal government's general conspiracy statute, 18 USC 371, requires the additional element of an overt act. One of the overt acts included in Mr. Zubke's federal conspiracy charge was the charge that is the basis of the case at bench, possession with intent to deliver of cocaine. The federal conspiracy charge is inextricably linked to the possession with intent to deliver charge it being one of the overt acts for the federal charge. Thus the same criminal act is the basis of both the federal and state charges. Or, as the Court of Appeal said in its opinion in this case: 'This general practice effectively renders the state substantive crime a functional element of the federal conspiracy crime and, accordingly, **MCL** 333.7409 would apply.' (7a).

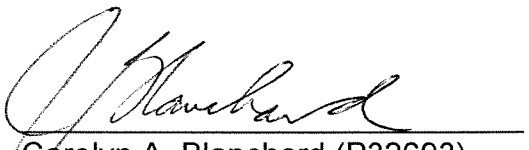
The prosecutor gives no authority for his conclusory argument that **MCL**

333.7409 applies only to Article 7 of the controlled Substances Act and not to a crime which has as an overt act a crime punishable by Article 7 and which forms the basis of a federal crime of conspiracy. The sense of the statue says that Section 7409 is a statutory double jeopardy bar to prosecution in this state case because the defendant has already been convicted for this offense in the federal case and Judge Jackson was correct in dismissing the state case on statutory double jeopardy grounds.

## RELIEF

Wherefore, for all these reasons, Defendant-Appellee Timothy Zubke, respectfully requests that this Honorable Court affirm the Court of Appeals.

Respectfully submitted,



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